RECORD
AND
BRIEFS

NO. 16-327

IN THE

Supreme Court of the United States

JAE LEE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In the context of a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States, whether it is always irrational for a defendant to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. Petitioner is Mr. Jae Lee. Respondent is the United States of America.

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OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit's opinion, Pet. App. 1a–10a, is reported at 825 F.3d 311. The United States District Court for the Western District of Tennessee's opinion, Pet. App. 11a–50a, is not reported but is available at 2014 WL 1260388. The Report and Recommendation of the Magistrate, Pet. App. 51a–77a, is not reported but is available at 2013 WL 8116841.

JURISDICTION

The district court had federal-question jurisdiction under 28 U.S.C. § 1331, and the court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals filed its opinion on June 8, 2016. Pet. App. 1a. Mr. Jae Lee filed a petition for certiorari on September 6, 2016, and the Court granted the petition on December 14, 2016. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to have the Assistance of Counsel for his defence.

INTRODUCTION

A defendant demonstrates *Strickland* prejudice when the objective evidence establishes that it would be rational under the circumstances for him to reject a plea offer. For some defendants, a plea's deportation consequences are so severe that it is rational to reject the plea and pursue a better bargain or trial, no matter the strength of the prosecution's evidence. The Sixth Circuit was wrong to hold categorically that "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial." Pet. App. 4a, 10a.

Petitioner Jae Lee has been a legal resident of the United States since moving from South Korea with his parents in 1982. Mr. Lee has never returned to Korea. At an early age, Mr. Lee left his family home in Brooklyn to assist an aunt with her restaurant in the Memphis area. He built on that experience to become a successful business owner, opening and operating two restaurants in the Memphis area. Regrettably, he also started using ecstasy at parties and was charged with possession of ecstasy with intent to distribute under 21 U.S.C. § 841(a)(1).

In 2009, Mr. Lee pled guilty to possession of ecstasy with intent to distribute and received a sentence of a year and a day, a reduction from the 24- to 30-month Guidelines range. Mr. Lee's trial counsel assured him that the plea would not result in deportation. If only that was so. Lee's plea offense results in mandatory deportation and permanent exile from the United States. See 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); 1182(a)(9)(A)(i). The government concedes that Mr. Lee's trial counsel provided ineffective assistance.

The government now insists that Mr. Lee cannot demonstrate prejudice under *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), because, the government says, there is strong evidence of Mr. Lee's guilt. In the government's view, a rational defendant never considers a plea's consequences, only the quality of the evidence arrayed against him. Not so. Consider a defendant whose counsel incorrectly advised him that a plea would avoid imposition of the death penalty, when in fact the exact opposite was true. No matter how overwhelming the evidence of guilt, it would still be rational for the defendant to withdraw the plea and take his chances at trial because the consequences are so severe. Defendants consider a multitude of factors when deciding whether to reject a plea. The strength of the government's evidence is just one factor.

For a long-term, permanent resident, remaining "in the United States may be more important . . . than any potential jail sentence." *Padilla* v. *Kentucky*, 559 U.S. 356, 368 (2010) (quotation omitted). For some immigrants, deportation may result in death. For others, the prospect of permanent exile is so distressing that they would risk trial, whatever the odds. And in either situation, a properly counseled defendant would bargain for a non-deportable plea offense, or at least plea to avoid mandatory deportation.

If Mr. Lee's lawyer had provided constitutionally adequate advice about the immigration consequences of the plea, Mr. Lee could have sought an alternative plea, even one involving a more serious offense that risked a lengthier prison sentence—that protected Mr. Lee's immigration status. Mr. Lee also could have sought a plea that left him free to pursue relief

from removal based on the considerable equities in his case. Alternatively, Mr. Lee could have required the government to carry its burden of proof beyond a reasonable doubt at trial. But his lawyer's ineffectiveness prejudicially deprived Mr. Lee of all these opportunities.

Objective evidence shows that Mr. Lee would not have pled guilty had he been properly advised. His attorney indicated that deportation was Mr. Lee's "main concern," Pet. App. 54a, and that Mr. Lee would have chosen trial had he known his plea equaled deportation, Pet. App. 56a. As the Magistrate Judge who conducted the § 2255 evidentiary hearing found, "it would have been rational for [Mr. Lee] to choose to go to trial, whatever the likelihood of success . . . because under the circumstances, deportation was, objectively, at least as undesirable as any prison sentence." Pet. App. 76a.

Mr. Lee has willingly spent more than seven years in detention awaiting the outcome of this litigation, rather than allowing himself to be deported immediately after serving his one-year sentence. This fact alone is strong objective evidence that avoiding deportation is of greater importance to Mr. Lee than the possibility of serving a significantly longer prison sentence.

The court of appeals should be reversed, and Mr. Lee's § 2255 petition should be granted.

STATEMENT OF THE CASE

A. Mr. Jae Lee

Petitioner Jae Lee is a lawful permanent resident of the United States. J.A. 161–62. He and his parents arrived in the United States in 1982, when Jae Lee was 13 years old, and he has never returned to his birth country of South Korea. J.A. 130, 161. Jae Lee's parents became naturalized citizens of the United States. J.A. 163. They are elderly, and Jae Lee has historically taken care of them. J.A. 171.

Jae Lee's parents settled in Brooklyn, New York, and opened a coffee shop in upper Manhattan. J.A. 161. Jae Lee was educated in United States public schools, graduating from a business high school in New York City. J.A. 161–62.

In 1987, Jae Lee moved to Memphis, Tennessee, and worked in a restaurant for several years. J.A. 161. With his parents' help, Jae Lee then opened his own restaurant in Bartlett, Tennessee, the Mandarin Palace Chinese Restaurant. J.A. 161, 163. After 14 successful years with the Mandarin, Mr. Lee opened a second restaurant in Memphis, Tennessee, and made arrangements to continue operating both businesses, even while being held in detention. J.A. 44, 161, 163.

Mr. Lee has now been held in detention for more than seven years awaiting the outcome of this litigation, far longer than his exposure had he gone to trial.

B. The indictment

Although a successful entrepreneur with no previous criminal convictions, Mr. Lee used ecstasy, a recreational drug. Acting on a tip, law enforcement officers executed a search warrant at Mr. Lee's home on January 6, 2009, and reported finding 88 ecstasy pills, three valium pills, and a firearm. J.A. 83. Mr. Lee was charged with possessing ecstasy with the intent to distribute in violation of 21 U.S.C. § 841(a). J.A. 5. Conviction of this charge is an "aggravated felony" that results in mandatory, permanent deportation for the defendant. 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); 1182(a)(9)(A)(i). Mere possession of ecstasy is a misdemeanor under federal law, not an aggravated felony, and thus does not result in mandatory deportation.

C. Mr. Lee's defense counsel

Jae Lee retained Larry Fitzgerald to represent him on the federal indictment. J.A. 166. Mr. Lee told Mr. Fitzgerald that he was a citizen of South Korea and a lawful resident alien in the United States. J.A. 162, 167–68, 219. Mr. Lee further advised Mr. Fitzgerald that he had never returned to South Korea since arriving in this country. J.A. 130–31.

Unfortunately, Mr. Fitzgerald had no expertise or experience in immigration law. J.A. 228. And he had not represented immigration clients at the time he represented Mr. Lee, nor did he later acquire any up to the hearing on Mr. Lee's § 2255 petition. J.A. 228. Mr. Fitzgerald did not know that a conviction for possession with the intent to distribute ecstasy would result in mandatory deportation. J.A. 226. And Mr. Fitzgerald did not seek the assistance of an immigration attorney when representing Mr. Lee.

J.A. 158; Pet. App. 54a–55a. In Mr. Fitzgerald's discussions with Mr. Lee, Lee "repeatedly" asked whether he would be deported and indicated that avoiding deportation "was his *main concern*." Pet. App. 54a (emphasis added). But Mr. Fitzgerald never attempted to negotiate an alternative disposition that avoids mandatory deportation at the very least, because, as discussed below, he erroneously thought he had already done so.

In February 2009, less than one month after Mr. Lee was indicted, Mr. Lee participated in a proffer session with the government. Pet. App. 55a. In exchange for a guilty plea to possession with intent to distribute, the government agreed to deduct three points for acceptance of responsibility, reducing Mr. Lee's offense level to 17. *Ibid.* (Mr. Fitzgerald told Mr. Lee that this reduction made Lee eligible for the statutory safety valve, which was also incorrect. J.A. 133, 202.) Mr. Fitzgerald told Mr. Lee he would likely face a 3- to 5-year prison sentence if he went to trial, while the plea would result in a much shorter term or possibly even probation. Pet. App. 55a. Mr. Fitzgerald also told Mr. Lee that the government was not seeking to deport Lee as part of the proposed plea agreement. *Ibid.* As Mr. Lee averred, Mr. Fitzgerald told him that Lee's "30+ years of living in the U.S. and strong ties, in combination with a lack of prior criminal history and the small amount of drugs involved," made it "impossible for the Government to deport" Mr. Lee, "even if they had wanted to." J.A. 131. Conversely, Mr. Fitzgerald advised, if Mr. Lee pursued his constitutional right to a jury trial, the government would initiate deportation proceedings if a conviction occurred. J.A. 168.

A few days before the plea change, Mr. Lee recalls, Mr. Fitzgerald told him that the non-inclusion of any deportation terms in the "binding" plea agreement "fully protected" Lee. J.A. 132. It was only because of this advice that Mr. Lee accepted the deal and pled guilty on June 17, 2009. Pet. App. 56a; J.A. 132. Mr. Fitzgerald later testified that Mr. Lee's belief that he would not be deported was "the key to [Lee's] decision." Pet. App. 56a. Mr. Fitzgerald also testified that if Mr. Lee had known a guilty plea would result in deportation, Lee would have chosen to proceed to trial, and Mr. Fitzgerald would have advised him to do so. *Ibid.*; J.A. 244. Mr. Lee testified that he would absolutely have accepted the risk of going to trial if he had known a plea would result in his deportation. Pet. App. 56a.

At the change-of-plea hearing, the court informed Mr. Lee that deportation and ineligibility for citizenship were potential consequences of his guilty plea, and the court asked Mr. Lee if those consequences affected his decision to plead guilty. Pet. App. 57a. Mr. Lee said "Yes, Your Honor," J.A. 103, then answered "I don't understand" when asked how these consequences affected his decision. *Ibid.* As explained further below, Mr. Fitzgerald assured Mr. Lee that despite the Court's inquiry, Mr. Lee would not be deported. J.A. 132–33, 210–11; see J.A. 235. On September 28, 2009, Mr. Lee was sentenced to a period of confinement of a year and a day. Pet. App. 57a.

Mr. Lee soon learned that the correctional facility where he was confined "exclusively housed federal inmates" facing deportation after completing their sentences. Pet. App. 58a. Shortly thereafter, Mr. Lee's case manager told him that his conviction rendered him deportable, and that removal proceedings were imminent. *Ibid.* Mr. Lee immediately contacted Mr. Fitzgerald, who told Lee that Lee was mistaken and that he was not going to be deported. J.A. 137. Prison staff re-confirmed that it was Mr. Fitzgerald who was mistaken. *Ibid.* Mr. Lee requested pleadings and a letter from Mr. Fitzgerald, which Mr. Fitzgerald took several months to provide. *Ibid.* Mr. Fitzgerald wrote a "To Whom It May Concern" letter, noting that there "was never any discussion of deportation during the negotiation of the Plea Agreement or during the Sentencing." J.A. 129. It was Mr. Fitzgerald's understanding "that the Government was not seeking Deportation of Mr. Jae Lee." *Ibid.* On September 24, 2010, Mr. Lee filed *pro se* his motion for habeas relief under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. Pet. App. 58a–59a.

D. The evidentiary hearing

Mr. Lee waited sixteen months—longer than his yearlong sentence—for an evidentiary hearing. At the hearing, Mr. Lee testified that Mr. Fitzgerald affirmatively advised him regarding the plea: "You have been in the United States so long they cannot deport you. Even if they want to deport you, it's not in the plea agreement, the government cannot deport you." Pet. App. 56a. In fact, Mr. Fitzgerald grew irritated with Mr. Lee for bringing up the deportation issue so often:

> Every time I ask him about that because, you know, I was worried about the deportation, my immigration status. and he always said why you are worrying about something that you don't need to worry about, you have been in the United States so long they cannot deport you. Even if they want to deport you, it's not in the plea agreement, the government cannot deport you. So he was like, one point he was pretty upset because every time something comes up I always ask about immigration status. [J.A. 170.]

As the Magistrate Judge found in her Report and Recommendation, the "testimonies of Lee and Fitzgerald were consistent that deportation was the determinative issue in Lee's decision whether to accept the plea deal." Pet. App. 56a. Regarding the plea colloquy, where Mr. Lee said "I don't understand" in response to the court's question about deportation, Mr. Lee testified that he looked to Mr. Fitzgerald for guidance. Fitzgerald assured Lee that he could disregard the deportation warning because it was only a "standard warning for non-U.S. citizen[s]." Pet. App. 57a; J.A. 132–33, 210–11.

Regarding the merits of the case against Mr. Lee, Mr. Fitzgerald thought that it was a "bad case to try," because he had not identified a basis to attack the search of Mr. Lee's home, and he believed that the number of pills and other evidence weakened a defense that the ecstasy was for Mr. Lee's personal use rather than distribution. Pet. App. 54a. Mr. Fitzgerald thought that going to trial would have been a losing proposition because "the best thing that could have come out of this was maybe a possession, that's it." J.A. 238. Mr. Fitzgerald was apparently

unaware that a simple possession conviction would have avoided the permanent deportation consequences of an aggravated-felony conviction. When Mr. Lee pled guilty in 2009, first-time possession of any controlled substance other than Flunitrazepam (the date-rape drug) or more than five grams of crack cocaine would have allowed Mr. Lee to be eligible for cancellation of his deportation. See *Lopez* v. *Gonzales*, 549 U.S. 47, 54 & n.4 (2006); 8 U.S.C. § 1229b(a).

E. Post-hearing proceedings

In a post-hearing brief, the government conceded that Mr. Lee's counsel was ineffective and that Mr. Lee was prejudiced by the deficiency. R. 40, Resp. of the U.S. to Pet'r's Post Hr'g Br. in Supp. of Mot. Pursuant to 28 U.S.C. § 2255, pp. 2–3. Nonetheless, said the government, Mr. Lee was not entitled to relief because *Padilla* did not apply retroactively, *ibid.*, a question that had divided the circuits. Proceedings were stayed when this Court granted certiorari to answer that question. A year later, this Court held in *Chaidez* v. *United States*, 133 S. Ct. 1103 (2013), that *Padilla* did not apply retroactively to cases that were on collateral review at the time of the decision. Because pre-*Padilla* Sixth Circuit precedent recognized an independent claim for gross misadvice concerning a conviction's consequences, Pet. App. 30a–31a, 68a–72a, this case proceeded on the separate question the Court did not address in *Padilla* v. *Kentucky*, 559 U.S. 356, 360 (2010), when a defendant facing deportation can demonstrate *Strickland* prejudice.

In the district court, the Magistrate Judge concluded that Mr. Lee satisfied the deficient-performance prong because Mr. Fitzgerald "affirmatively misadvised Lee as to the immigration consequences of pleading guilty to the drug-trafficking crime for which Lee was indicted." Pet. App. 73a. As to prejudice, Mr. Lee contended that "his life-bonding ties are in the United States," and he "had nothing to lose by going to trial if the alternative was to be deported," because he no longer had any connection to South Korea. Pet. App. 75a. But the government argued that going to trial would not have been rational given the evidence of Mr. Lee's guilt, which the government believed was overwhelming.

The Magistrate Judge acknowledged that the prejudice test is objective, not subjective, and that "a prediction of the likely outcome at trial is frequently dispositive of the inquiry." Pet. App. 75a (citation omitted). But the Magistrate Judge concluded that Mr. Lee had established prejudice because if he had known that a plea would result in mandatory deportation, "*it would have been rational for him to choose to go to trial*, whatever the likelihood of success and even though he might face one to five years greater a sentence than if he had pled guilty, because under the circumstances, deportation was, objectively, at least as undesirable as any prison sentence." Pet. App. 76a (emphasis added). The Magistrate Judge recommended setting aside Mr. Lee's guilty plea and vacating his conviction. *Ibid.*

The district court adopted and rejected in part the Report and Recommendation and denied Mr. Lee's § 2255 motion. The court said that although the Report and Recommendation purported to apply an

objective standard, its prejudice analysis, focusing on Mr. Lee's desire to avoid deportation, was subjective. "The proper focus under an objective standard," wrote the district court, "is on whether a reasonable defendant in Lee's situation would have accepted the plea offer and changed his plea to guilty." Pet. App. 46a. "In light of the overwhelming evidence of Lee's guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation." *Ibid.* The district court certified the issue for appeal.

The Sixth Circuit affirmed. It began its analysis by noting Mr. Fitzgerald's erroneous advice and the government's concession that Mr. Lee satisfied the deficient-performance prong of the *Strickland* test. Pet. App. 2a–3a. Turning to the prejudice test, the court noted that whether Mr. Lee satisfied the standard was "not immediately obvious," Pet. App. 3a, because:

> On the one hand, the district court's conclusion that the evidence of guilt was "overwhelming" is not clearly erroneous, and deportation would have followed just as readily from a jury conviction as from a guilty plea. . . . On the other hand, . . . we do not doubt Lee's contention that many defendants in his position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were. [Pet. App. 3a–4a.]

Asking whether it would be "rational" to reject a plea that would result in deportation where the evidence of guilt was strong, the Sixth Circuit noted it

had previously held that "being denied the chance to throw 'a Hail Mary' at trial does not by itself amount to prejudice." Pet. App. 4a (citing *Pilla* v. *United States*, 668 F.3d 368, 373 (6th Cir. 2012)). Bound by the decision in *Pilla*, the panel emphasized that its conclusion "should not be read as endorsing Lee's impending deportation," Pet. App. 10a:

> It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't live in since childhood for committing a relatively small-time drug offense. [*Ibid.*]

F. A postscript on prejudice

As mentioned above, in its initial post-hearing brief in the district court, the government conceded that Mr. Lee's counsel was ineffective *and* that Mr. Lee was prejudiced by the deficiency. R. 40, Resp. of the U.S. to Pet'r's Post Hr'g Br. in Supp. of Mot. Pursuant to 28 U.S.C. § 2255, p. 2. The government expounded on its assessment of Mr. Lee's prejudice: the "record evidence elucidated that based on the petitioner's long-term ties to the United States and businesses that he owned or operated in the United States, [Mr. Lee] faced severe sanctions and would not have pleaded guilty but insisted on going to trial." *Ibid.* The government distinguished the record evidence here from that in *Pilla*, where the petitioner failed to demonstrate a reasonable probability that, but for counsel's misadvice, she would have rejected the plea and insisted on going to trial. *Id.* at 2–3. After this Court's *Chaidez* opinion foreclosed Mr. Lee's claim under *Padilla*, the government has taken the opposite position on prejudice.

SUMMARY OF THE ARGUMENT

A defendant is prejudiced where "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill* v. *Lockhart*, 474 U.S. 52, 58–59 (1985). The Sixth Circuit has adopted a categorical approach that, when faced with "overwhelming evidence" of guilt, a defendant can never be prejudiced by accepting a plea. Pet. App. 4a.

The Sixth Circuit's approach is wrong. The strength of the prosecution's evidence is just one of many factors a defendant considers before accepting a plea, including the length of imprisonment, the type of penalty and conditions of confinement, fines, and immigration consequences. In fact, as this Court has recognized, there are few areas where a conviction's consequences matter more to a non-citizen defendant than mandatory deportation. *Padilla*, 559 U.S. at 364; *INS* v. *St. Cyr*, 533 U.S. 289, 321 (2001).

When counsel misadvises a defendant about the deportation consequences of a plea, prejudice is generally shown in three ways: (1) if the defendant demonstrates a reasonable probability of a more favorable outcome at trial that avoids deportation; (2) if a defendant would rationally reject a plea offer to negotiate for an agreement with lesser deportation consequences; or (3) if the consequences of deportation are so significant that a defendant would reasonably reject the plea and go to trial. The strength of the prosecution's evidence is of greatest significance only to the first of these three.

Here, ineffective assistance deprived Mr. Lee of an opportunity to bargain for a plea with lesser or no deportation consequences. It also deprived him of his right to trial. This Court should reverse.

ARGUMENT

I. A defendant facing strong evidence of guilt can rationally reject a plea offer because of the plea's immigration consequences.

Missouri v. *Frye*, 132 S. Ct. 1399, 1407 (2012), explains that our criminal justice system is not one of trials, but of pleas. For that reason, "the negotiation of the plea bargain, rather than the unfolding of a trial, is almost always the critical point for the defendant." *Ibid.* Accordingly, a criminal defendant has a constitutional right to effective representation in plea negotiations. *Id.* at 1407–08. A defendant's claim of ineffective assistance at the plea stage is evaluated under the familiar framework adopted in *Strickland* v. *Washington*, 466 U.S. 668 (1984). *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985). A defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. Application of the *Strickland* analysis compels relief here.

In *Padilla* v. *Kentucky*, 559 U.S. 356, 375–76 (2010), this Court held that a lawyer renders constitutionally ineffective counsel when he fails to tell his client that pleading guilty will subject the client to deportation. Accord *id.* at 375 (Alito, J., concurring) (A "criminal defense attorney fails to provide effective assistance within the meaning of *Strickland* . . . if the attorney misleads a noncitizen client regarding the removal consequences of a conviction."). Here, Lee's counsel affirmatively misadvised him that pleading guilty would not have deportation consequences, J.A. 170, and the government concedes that Fitzgerald's performance was deficient. Pet. App. 2a–3a. Thus, the only remaining issue is whether Mr. Lee can establish prejudice. He can.

In *Hill* v. *Lockhart*, 474 U.S. 52 (1985), this Court set forth the prejudice analysis applicable to claims of ineffective assistance at the plea stage. Under *Hill*, the prejudice analysis in the context of guilty pleas "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58–59. A defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 57 (quoting *Strickland*, 466 U.S. at 694). The prejudice analysis is objective. *Id.* at 59–60.

Hill points to several factors that are relevant to the prejudice determination. The Court observed that in many guilty-plea cases, the reasonableness analysis is tied to whether a defendant may have obtained a better outcome by proceeding to trial. *Id.* at 59. But the *Hill* defendant claimed prejudice because his counsel misadvised him he would be eligible for parole after serving one third of his sentence when, as a second offender, he would not be eligible for parole until he served half of his sentence. *Id.* at 55, 60. To assess whether the defendant was prejudiced, this Court considered whether the defendant had averred that he would have gone to trial rather than accept the plea had he received accurate advice, and whether there were special circumstances showing that the defendant placed particular emphasis on his parole eligibility in deciding whether to plead guilty. *Id.* at 60.

Hill shows that although the outcome at trial matters, the trial court's assessment of the defendant's likelihood of success is not always the determinative consideration in guilty-plea cases. Accord *Gonzales* v. *United States*, 722 F.3d 118, 132–33 (2d

Cir. 2013). And this Court has recognized that this is particularly true with regard to immigration consequences of a plea, noting that the availability of cancellation of removal is "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *INS* v. *St. Cyr*, 533 U.S. 289, 321–23 (2001).

The federal and state courts have applied *Hill*'s analysis to find prejudice where counsel fails to accurately advise a defendant of the immigration consequences of a guilty plea. For example, in *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 785 (9th Cir. 2015), the court determined that the defendant not properly advised of the immigration consequences of her plea could show prejudice because she placed a particular emphasis on avoiding deportation. Similarly, in *DeBartolo* v. *United States*, 790 F.3d 775, 780 (7th Cir. 2015), the petitioner was able to show through objective evidence that there was "a reasonable probability that he would not have pleaded guilty . . . ."

In the context of a guilty plea that arises from counsel's failure to correctly advise a defendant of the immigration consequences of a plea, prejudice can be shown in at least three ways. First, there can be no dispute that a defendant suffers prejudice if he can demonstrate a reasonable probability of a more favorable outcome at trial that avoids deportation. *E.g.*, *Hill*, 474 U.S. at 59. The defendant's ability to prove this type of prejudice is inversely tied to the strength of the evidence against him. See *ibid.* Second, a defendant is prejudiced if a defendant would rationally reject a plea offer to negotiate for a different plea agreement with no or lesser deportation consequences. Evidence of guilt can relate

to the hypothetical plea-bargaining process but is not determinative. Third, in certain instances, the consequences of deportation are so significant that a defendant would reasonably reject the plea and go to trial regardless of the strength of the evidence against him. *E.g.*, *DeBartolo*, 790 F.3d at 780. And under *Hill*, this too is sufficient prejudice to vacate a guilty plea. See *Massachusetts* v. *Lavrinenko*, 38 N.E.3d 278, 291–92 (Mass. 2015) (adopting similar framework).

A. A defendant can reject the government's plea offer rationally expecting to negotiate a plea that will not result in deportation.

The plea-bargaining process offers a non-citizen defendant numerous avenues for eliminating or reducing negative immigration consequences. As this Court recognized in *Padilla*, even a "rudimentary understanding of the deportation consequences of a particular offense" may allow defendant's counsel to "plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation." 559 U.S. at 373.

The court of appeals' opinion below discounts the possibility of negotiating a different plea to avoid mandatory deportation when counsel has and provides accurate information on immigration consequences. A criminal defendant who is misadvised on the immigration consequences of a plea offer is denied the opportunity to reject a plea that has serious deportation consequences and negotiate for a plea that will avoid deportation altogether, or at least reduce the consequences thereof. There are numerous such opportunities.

1. The United States Attorney's Pretrial Diversion Program is a disposition which does not trigger deportation consequences for the divertee. U.S. Dep't of Justice, *United States Attorneys Manual, Criminal Resources Manual*, § 712, Pretrial Diversion (2016). The availability of diversion makes rejection of the government's plea offer reasonable, at least until the possibility of diversion is withdrawn.

2. Noncitizens convicted of aggravated felonies face "the harshest deportation consequences." *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 566 (2010). The primary penalties are that (1) the defendant is rendered deportable, and (2) the defendant is ineligible for several forms of immigration relief, including cancellation of removal, asylum, and the benefits from voluntary departure.[1] See *Torres* v. *Lynch*, 136 S. Ct. 1619, 1635 (2016) (Sotomayor, J., dissenting) (citing 8 U.S.C. § 1229b). It may well be reasonable for a defendant to reject a plea offer despite strong evidence of guilt with the reasonable expectation he can negotiate a plea to an offense that is not an aggravated felony. This would preserve the defendant's ability to avoid automatic deportation. And for that reason, a defendant might offer to plead to a non-aggravated felony even if the sentence of confinement is longer. *E.g.*, *People* v. *Bautista*, 8 Cal. Rptr. 3d 862, 870 (Cal. Ct. App. 2004).

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[1] Other immigration consequences tied to convictions for an aggravated felony include ineligibility for asylum, which would otherwise allow an immigrant with a well-founded fear of persecution in their country of origin to avoid deportation, 8 U.S.C. §§ 1101(a)(42), 1158(a)(1), (b)(2)(A)(ii), (b)(2)(B); permanent inadmissibility for reentry into the United States, 8 U.S.C. § 1182(a)(2)(A)(i); and enhanced penalties for illegal reentry, 8 U.S.C. § 1325(b)(2).

For example, if a defendant in a drug case pleads to a federal misdemeanor, the defendant will avoid the mandatory deportation consequences of an aggravated felony because the INA's aggravated-felony definition incorporates federal drug-trafficking crimes, which are keyed to whether the offense is a felony or misdemeanor under federal law. See 8 U.S.C. § 1101(a)(43)(B); *Lopez* v. *Gonzales*, 549 U.S. 47 (2006); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013). Thus, a defendant charged with intent to distribute could bargain for a simple possession charge under 18 U.S.C. § 844 and avoid the consequences of an aggravated felony. Possession is a misdemeanor with a maximum sentence of less than one year and not an aggravated drug-trafficking felony that results in automatic deportation. See 8 U.S.C. § 1101(a)(43)(B). Such a defendant would still be deportable, but eligible for cancellation of removal. See 8 U.S.C. § 1229b (permitting the Attorney General to cancel a non-citizen defendant's deportation if certain residency benchmarks are met, but not if the alien has committed an aggravated felony).

Here, simple possession was a disposition that Mr. Fitzgerald thought possible if Mr. Lee's case went to trial, a fact that might have made simple possession an attractive disposition for the government as well as Mr. Lee. And at the time Mr. Lee pled in 2009, first-time possession for *any* controlled substance other than Flunitrazepam (the date-rape drug) or more than five grams of crack cocaine would

have made Mr. Lee eligible for cancellation. *Lopez*, 549 U.S. at 54 & n.4.[2]

Another alternative available to a defendant would be to negotiate a plea to a drug distribution in violation of 21 U.S.C. §§ 331(t) & 353(e) (the Food, Drug, and Cosmetics Act), for a substance like Valium (which law enforcement reported finding in their search of Mr. Lee's home). Arguably, this would not be a controlled-substance offense or drug-trafficking aggravated felony. See *Borrome* v. *Attorney General of the U.S.*, 687 F.3d 150 (3d Cir. 2012).

3. The Internal Revenue Code includes multiple misdemeanor offenses to which a defendant charged with a crime that results in ill-gotten gain could plausibly plead. (Like Al Capone, persons who engage in controlled substance offenses often do not report their profits as taxable income.) These crimes do not have deportation consequences, or at least avoid mandatory deportation. For example, the failure to pay any tax is a misdemeanor offense. 26 U.S.C. § 7203. Likewise, the failure to keep records or supply information are misdemeanors. *Ibid.* See also 26 U.S.C. §§ 7204, 7205 (other IRS misdemeanors include providing false information related to withholdings). Provided the loss to the victim or government does not exceed $10,000, the offense is

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[2] Somewhat counterintuitively, in specifying the grounds of admissibility under 8 U.S.C. § 1182, Congress did not make having an aggravated-felony conviction a separate ground of inadmissibility. Consequently, not all aggravated felonies make a person inadmissible. See *In re Michel*, 21 I&N Dec. 1101 (BIA 1998) (discussing eligibility for a waiver despite an aggravated-felony conviction).

not deemed an aggravated felony for purposes of deportation. See 8 U.S.C. § 1101(a)(43)(M).

A well-counseled defendant seeking to avoid deportation could consider all of these plea possibilities. And, because consideration of a plea agreement's deportation consequences is part of a prosecutor's responsibility in seeking justice, the government too has a duty to consider them. Federal prosecutors are required to "weigh all relevant considerations, including . . . [t]he probable sentence or other consequences if the defendant is convicted." U.S. Dep't of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997). Various state jurisdictions have adopted similar policies which require prosecutors to craft plea agreements that avoid punishments that are disproportionate to what other defendants would receive for the same crime. *E.g.*, Los Angeles County District Attorney, Felony Case Special Directive 03-04 (2003) *available at* http://tinyurl.com/zmkcjdf. Although prosecutors may not be authorized to guarantee non-deportation in a plea agreement, prosecutors should consider the immigration consequences of a conviction when making charging and plea decisions. This happens so routinely that California recently required prosecutors to "consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution." Cal. Pen. C. 1016.3(b); accord Cal. Pen. C. 1016.2(d).

Proving that a defendant could rationally expect to negotiate a more favorable plea presents a challenge, as noted by the Sixth Circuit below. Pet. App. 7a–8a. A defendant may, in some instances, demonstrate the likelihood of negotiating a plea to an

offense with no or lesser deportation consequences by identifying similar plea agreements entered into by prosecutors with defendants charged with the same offense. See *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 788–89 (9th Cir. 2015). A defendant can also offer testimony from an attorney with experience negotiating plea agreements that accounted for immigration consequences. *Bautista*, 8 Cal. Rptr. 3d at 870–71. But, given that ineffective-assistance claims are frequently filed by *pro se* defendants serving their sentences, such a level of proof should not be required. *Roe* v. *Flores-Ortega*, 528 U.S. 470, 486 (2000) (addressing potential unfairness of prejudice to an indigent or *pro se* defendant). The better approach is to consider whether there are offenses with no or lesser deportation consequences to which the defendant could have pled guilty for the same conduct. See *DeBartolo* v. *United States*, 790 F.3d 775, 779 (7th Cir. 2015). Indeed, in some instances, this is as straightforward as agreeing to a sentence of less than one year so as to avoid an aggravated felony. See 8 U.S.C. § 1101(a)(43)(F), (G), (P)–(S).

There are grave consequences that attend a plea for a long-term permanent resident immigrant. A defendant with such continuing connections could rationally reject a plea or pursue a plea with better immigration consequences, even in the face of strong evidence of guilt.

B. A defendant can also rationally reject a plea and take his chances at trial.

There are numerous reasons why defendants rationally reject plea offers and instead invoke their constitutional right to a trial by jury, despite what appear to be long odds of success.

1. At the outset of a criminal case, it is difficult to predict with any precision exactly what the final result following trial will be. Counsel may learn of a fact that will result in the government's key evidence being suppressed. An indispensable witness may unexpectedly fail to appear to testify at trial, or may change her testimony while on the stand. A confidential informant may prove unreliable. Or the jury may convict the defendant of a lesser offense, an outcome Mr. Fitzgerald thought possible in the case of Mr. Lee. J.A. 244.

Moreover, when unexpected things go wrong with the government's case, the prosecutor can offer a plea to a much lower offense. In but one example, *United States* v. *Enquist*, 745 F. Supp. 541 (N.D. Ind. 1990), the defendant was originally charged with possession with the intent to distribute methamphetamine and conspiracy to do the same. Before trial, a key prosecution witness could not be found, and the government doubted it could prove guilt beyond a reasonable doubt. So the prosecution offered, and the defendant accepted, a plea to a misdemeanor. The court approved the plea because of the uncertainty of trial given the missing witness.

Most fundamentally, a jury may simply conclude that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. Such a result is not jury nullification. It is the natural result of an

individual's constitutional right to invoke a trial by jury involving the highest burden of proof known to American law. See *Padilla* v. *Kentucky*, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012) ("If he had insisted on a trial, the Commonwealth would have had to prove his guilt beyond a reasonable doubt, and Padilla would have a chance of avoiding a conviction that subjected him to mandatory deportation."). A criminal defendant can never be forced to take a plea and abandon his right to a jury trial simply because a court or prosecutor thinks the defendant's odds of prevailing at trial are slim.

2. Wholly aside from the likelihood that a defendant will be acquitted or convicted of a lesser charge, he may have additional rational reasons to reject a plea that will cause mandatory deportation. A defendant might think "a small chance of remaining with his family in the United States [is] worth the significant risk of a long prison term." *DeBartolo* v. *United States*, 790 F.3d 775, 779 (7th Cir. 2015); *State* v. *Sandoval*, 249 P.3d 1015, 1022 (Wash. 2011) ("For criminal defendants, deportation no less than prison can mean banishment or exile, and separation from their families. Given the severity of the deportation consequence, we think Sandoval would have been rational to take his chances at trial.") (quotations omitted).

In fact, a defendant "might even . . . prefer[ ] a lengthy prison term in the United States to a shorter prison term that would lead more quickly to deportation." *DeBartolo*, 790 F.3d at 779–80. The "lengthy prison term would at least keep him in the same country as his family, facilitating frequent visits by family members, which is important to prisoners." *Id.* at 780. (Mr. Lee has demonstrated this prefer-

ence by choosing to remain in U.S. detention for six additional years after serving his one-year sentence rather than accept deportation.)

3. A rational defendant might also consider "the disarray in the enforcement of U.S. immigration law." *DeBartolo*, 790 F.3d at 780. "There are constant calls for reform of the laws themselves and of the methods of enforcing them." *Id.* And while there appears to be political pressure sufficient to change the law, enforcement, or both regarding *illegal* immigrants, there is no such public argument being made with respect to long-term permanent immigrants who operate successful businesses. Judge Batchelder, writing for the Sixth Circuit, expressed this sentiment: "[i]n reaching this conclusion, we should not be read as endorsing Lee's impending deportation. It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't lived in since childhood for committing a relatively small-time drug offense." Pet. App. 10a.

4. Finally, in cases where it is not possible to obtain a plea without deportation consequences, a defendant may simply decide that a trial is preferable to certain deportation. As the Third Circuit has explained, "[t]he threat of removal provides an equally powerful incentive to go to trial if a plea would result in removal anyway." *United States* v. *Orocio*, 645 F.3d 630, 645 (3d Cir. 2011), *abrogated in other part by Chaidez*, 133 S. Ct. 1103 (2013). That may not be every defendant's decision, but it is not an irrational one for a defendant with robust ties to this country.

In sum, no matter the strength of the evidence, defendants victimized by ineffective assistance of counsel should not be deprived of the opportunity to negotiate a better plea or simply put the government to its burden of proving guilt beyond a reasonable doubt.

The government's position is that a rational defendant never considers such consequences. The government insists that a rational defendant would only consider the likelihood of success at trial, and if that probability is low, the defendant would accept a plea. Not so. Consider the case of a legal immigrant from Nigeria who is LGBT. On the one hand, he could accept a plea that would result in a one-year sentence served in the United States followed by certain deportation and likely death or imprisonment in his country of origin. See Max Bearka & Darla Cameron, "Here are the 10 countries where homosexuality may be punished by death," *Washington Post* (6/13/2016) *available at* http://tinyurl.com/h6hncgs. On the other, he could take the risk and invoke his right to a trial, knowing that his U.S. sentence might be extended a few years before removal, or that he might be acquitted or convicted of an offense with no or lesser deportation consequences. Taking such a risk is not irrational.

A conviction's consequences matter. And outside the death-penalty context, there are few areas where a conviction's consequences matter more than a mandatory deportation. *Padilla*, 559 U.S. at 364 ("deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes"); *INS* v. *St. Cyr*, 533 U.S. 289, 321 (2001) ("There can be little doubt that, as a gen-

eral matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." (citations omitted)).

This Court should reverse and hold that it is not always irrational for a defendant to reject a plea offer notwithstanding allegedly strong evidence of guilt. Mr. Lee does not propose a *per se* rule of prejudice. He requests a rule that allows a defendant to come forward with objective evidence demonstrating that he would have bargained for a different plea offense or taken his chances at trial rather than plead guilty to an offense that resulted in his permanent exile from the United States.

II. Mr. Lee was prejudiced because he would have reasonably rejected the plea, if he had been properly advised of the deportation consequences.

As noted above, a petitioner seeking to establish prejudice under the second *Strickland* prong must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984); see Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 How. L.J. 693, 700–06 (2011). In other words, the petitioner must show that to reject the plea and invoke the right to trial would have been "rational under the circumstances." *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010). This inquiry requires a fact-specific analysis that evaluates the weight of the evidence, the consequences of various legal options, and any circumstances that may affect a decision to enter a plea. *E.g.*, *Premo* v. *Moore*, 131 S. Ct. 733, 744 (2011).

The record shows that Mr. Lee would have proceeded to trial but for Mr. Fitzgerald's lack of insight regarding the deportation consequences of his plea. Mr. Fitzgerald testified that, had he known removal was mandatory, he would have advised Mr. Lee to proceed to trial. J.A. 236. As Mr. Fitzgerald explained, if the plea offers nothing of benefit, he will advise going to trial because "if I try it, I may win." J.A. 236. Accord *Orocio*, 645 F.3d at 645. Mr. Fitzgerald believed there was a possibility that Mr. Lee would be found not guilty or guilty only of simple possession, J.A. 244, an offense that would not trigger mandatory deportation.

There are numerous paths to such a result without relying on a "Hail Mary." Mr. Lee would have filed a motion challenging the prosecution's search warrant, attempting to suppress the evidence seized from Lee's apartment. J.A. 181, 213. (As part of the plea agreement here, Mr. Lee waived challenging the validity of the search warrant. J.A. 179–80, 212.) As Mr. Fitzgerald testified, even motions to suppress that do not initially look promising can improve at the hearing and the court may grant the motion. J.A. 229–31. Sometimes the suppression hearing itself uncovers a new justification for going to trial. *Ibid.* Other times, the government's loss of a confidential informant or other key witness will result in an acquittal or a conviction to a lesser charge.

Aside from the various positive trial outcomes, Mr. Lee was also deprived of his ability to negotiate for a plea offense without deportation consequences. Some of the options that would avoid deportation entirely, or at least result in lesser immigration consequences, include the following:

- First and foremost, Mr. Lee could have bargained for a simple possession charge under 21 U.S.C. § 844, a conviction that Mr. Fitzgerald thought was a possible trial outcome regardless. J.A. 167, 244. As explained above, such an offense is classified as a misdemeanor and not an aggravated drug-trafficking felony that results in automatic deportation. See 8 U.S.C. § 1101(a)(43)(B). Thus, Mr. Lee would be deportable but eligible for cancellation of removal.
- Mr. Lee could have bargained for a non-prosecution agreement. Mr. Lee was a first-time offender, and if counsel had been aware that possession-with-intent-to-distribute is an aggravated felony that leads to mandatory deportation, he likely would have encouraged Mr. Lee to cooperate to obtain a non-aggravated-felony plea.
- For the same reasons, Mr. Lee may have been able to negotiate for pre-trial diversion, as described above. Mr. Lee was eligible for the program because he was not accused of an offense that should be diverted for State prosecution, did not have two or more prior felony convictions, was not a public or former public official, and was not accused of an offense related to national security or foreign affairs. United States Attorneys Manual, Title 9-22.100 (Eligibility Criteria).

- Based on the three Valium reportedly found during the search, Mr. Lee could have pled to drug distribution in violation of 21 U.S.C. §§ 331(t) & 353(e) (the Food, Drug, and Cosmetics Act). As explained above, arguably this would not be a controlled-substance offense or drug-trafficking aggravated felony.

- Mr. Lee could have pled guilty to being an accessory after the fact with a 364-day sentence under 18 U.S.C. § 3. This is not a controlled-substance offense, see *In re Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997), and it is not an aggravated-felony obstruction offense under 8 U.S.C. § 1101(a)(43)(S) if the sentence is less than one year.

- Mr. Lee might have sought a plea under the Federal First Offender Act. Under that Act, a first-time offender found guilty of an offense under the Controlled Substances Act may be placed on probation. If he does not violate any conditions of probation, the defendant may seek dismissal of the proceedings, in which case the matter will "not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. § 3607(a), (b).

- Mr. Lee also could have pled guilty to misprision of a felony under 18 U.S.C. § 4. This is neither a controlled-substance offense, see *In re Velasco*, 16 I&N Dec. 281 (BIA 1977), nor an aggravated felony obstruction offense,

see *In re Espinoza*, 22 I&N Dec. 889 (BIA 1999).[3]

A creative defense attorney with knowledge of the criminal deportation consequences of various offenses would undoubtedly have many additional proposals for a prosecutor to consider. See *Padilla*, 559 U.S. at 373 ("Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."). And informed consideration of the deportation consequences of a plea benefits both the government and noncitizen defendants during the plea-bargaining process by allowing both sides to negotiate for an agreement that best satisfies their respective interests. The threat of mandatory deportation may motivate a defendant not only to negotiate for a plea offense without such consequences, but also to accept a plea notwithstanding a significant prison term.

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[3] A misprision conviction would be a crime involving moral turpitude. See *In re Robles-Urrea*, 24 I&N Dec. 22 (BIA 2006). But a person is deportable for a crime involving moral turpitude only if convicted within five years of being admitted into the United States or upon a second such conviction. 8 U.S.C. § 1227(a)(2)(A). Mr. Lee has been in the country for more than five years and has no such earlier conviction. For an example of a charged aggravated-felony resulting in a misprision plea, see *United States* v. *Navarete-Bravo*, No. 3:14-cr-001 (M.D. Tenn.) (transportation of illegal aliens and conspiracy to do the same).

As for the consequences of Mr. Lee's plea here, he will lose everything upon deportation and has gained little from the bargain. Mr. Lee's elderly parents reside in Brooklyn and are United States citizens. J.A. 13. He owns and operates two established businesses in the Memphis area. J.A. 163. He has spent his entire adult life in the United States and has not returned to South Korea since arriving as a child. J.A. 130, 162. All of his circumstances demonstrate that he had nothing to lose by going to trial or continuing to bargain for a non-deportable plea offense if the alternative was mandatory deportation following his guilty plea. These facts exemplify this Court's observation in *Padilla*: "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." 130 S. Ct. at 1483 (quotation omitted). Accord, *e.g.*, *United States* v. *Scott*, 394 F.3d 111, 119–20 (2d Cir. 2005) (finding *Strickland* prejudice in non-criminal deportation context where the petitioner demonstrated strong family ties, long-term residency in the United States, and counsel's errors).

The government may echo the Sixth Circuit's assessment that the record was devoid of evidence that Mr. Lee's counsel could have secured a plea that would have avoided mandatory deportation. Pet. App. 7a–8a. To begin, there could not have been any attempt to negotiate a better plea considering deportation consequences when Mr. Fitzgerald (and thus the client) mistakenly believed there would be no deportation consequences from Mr. Lee accepting the government's plea offer. And, as noted above, Mr. Fitzgerald testified at the evidentiary hearing that he thought the "best thing that could come out of [a trial] was maybe a possession, that's it," J.A. 238, demonstrating that he did not appreciate the lesser

deportation consequences of such a conviction. Mr. Fitzgerald also testified that Mr. Lee would have accepted a three-year sentence if it included a reliable assurance that Mr. Lee would not be deported. J.A. 244. This testimony confirms Mr. Lee's willingness to bargain away a considerable amount of liberty in exchange for a plea offer that avoided deportation.

The government may also continue to argue that Mr. Lee's only hope was jury nullification. Br. in Opp. 8–9. That argument is wrong, particularly given how early in the criminal proceedings Mr. Lee accepted the plea agreement. Mr. Lee testified that trial counsel never reviewed the elements of the crime with which the government charged him, and never explained what the government would have to prove at trial to secure a conviction. J.A. 177. Nor did counsel inform Mr. Lee that there was a confidential informant involved in his case; Mr. Lee learned this critical fact for the first time after he had already entered his guilty plea, when he saw his Pre-Sentence Report. J.A. 178. Trial counsel never even looked at the CD the government provided with photographs of the search of Mr. Lee's apartment. J.A. 185. It is difficult to imagine how anyone could have assessed the strength of Mr. Lee's case without reviewing these basic elements. Yet, despite all this, Mr. Fitzgerald testified that a successful defense of mere personal use was "not impossible." J.A. 218.

There is no doubt that Mr. Lee would have been willing to remain incarcerated for a longer period of time than the one year he actually received as a result of his deportable guilty plea. After finishing his year-and-a-day sentence, he was immediately placed into immigration custody and has been detained for an additional six years pending

resolution of his § 2255 motion and all subsequent appeals. At any time after he served his sentence, Mr. Lee could have allowed himself to be deported. He did not because he would rather serve more time in prison and remain in a country he considers his own than be deported to a land he has not been to since childhood.

Based on all the objective evidence, Mr. Lee would have rationally rejected the guilty plea that he entered had he known about its mandatory deportation consequence. There is at least a reasonable likelihood that competent defense counsel could have secured some type of disposition that avoided mandatory deportation based on the numerous ways a plea could have been structured to meet both parties' interests. And failing that, Mr. Lee would have chosen a trial over deportation. That is why the government initially conceded that Mr. Lee had demonstrated prejudice.

This Court should reverse the Sixth Circuit and grant Mr. Lee's § 2255 petition.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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